of no case where positive action is held criminal, unless the intention accompanies the act, either expressly or necessarily inferred from the act itself." See also *Miller* v. *The State*, 3 Ohio St. 475, in prosecutions for selling to minors, &c. And in *Stern* v. *State*, 53 Geo. 229, an indictment for allowing a minor to play at billiards, it was distinctly held, (quite contrary to *Com'th* v. *Evans*, *supra*) that the offence was not committed if the defendant acted in good faith and after reasonable inquiry as to the age of the person, though in fact he was under twenty-one. The language of the statute is not given in the report, but there is no intimation that the statute expressly requires positive knowledge of the age. A similar rule was applied in *Williams* v. *The State*, 48 Ind. 306, an indictment for selling intoxicating liquor to a person "in the habit of getting intoxicated." Evidence that the vendor believed and had reason to believe the vendee was a sober man and not in the habit of getting intoxicated was competent, though the contrary was true. This is in direct conflict with our principal case. The burden of proving good faith and cause to believe the buyer was a sober person, is said in Indiana to be on the seller. See *Farrell* v. *The State*, 45 Ind. 372.

The learned reader is referred to a very able article in favor of the view of our principal case, to be found in 12 Am. Law Review 469, by the late Judge WILDER MAY, and as supporting a contrary rule, to the note and cases cited by the late N. St. John Green, in *United States* v. *Anthony*, 2 Green Cr. Cas. p. 208, and Bishop's Crim. Law. While all agree it is a question of construction or intention of statute law, it is not easy to reconcile all the cases on the subject by any different phraseology used in the enactments.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Iowa.

STATE *v.* JONES.

Allowing a witness to answer a question only slightly leading, if at all, and which does not prejudice the party objecting, is not such error as will warrant a reversal.

Allowing a witness to answer a question calling for a conclusion of fact relevant to the case, such conclusion not being the ultimate fact to be found by the jury, is not error.

To render declarations admissible as a part of the *res gestæ*, it is not necessary that they should be precisely concurrent in point of time with the principal transaction. It is sufficient if they are near enough to clearly appear to be so spontaneous and unpremeditated and free from sinister motives, as to afford a reliable explanation of the principal transaction.

Questions asked upon cross-examination not tending to modify or explain the testimony of the witness given in chief, but to elicit testimony which would have the effect to discredit the testimony which the witness had given in chief; are not admissible as cross-examination.

Instructions must be based upon evidence and must not be misleading.

When the defence of insanity is interposed to an indictment for murder, evidence

as to the conduct, language and appearance of the defendant at other times than during the time of the alleged killing, is admissible, and an instruction which limits the evidence to the time of the alleged killing is erroneous.

If the evidence makes it merely probable to the jury that the defendant was insane at the time of the killing, he should be acquitted. It is sufficient if the evidence of insanity preponderates.

SEEVERS and ROTHROCK, JJ., dissenting.

APPEAL from the District Court of Harrison county.

The defendant was indicted for murder in the first degree. He was convicted of manslaughter and sentenced to the penitentiary for seven years. From the judgment he appeals.

Scott & Hight, for appellant.

Smith McPherson, Atty.-Gen., for the State.

The opinion of the court was delivered by

ADAMS, J.—This case is before us on a second appeal. See 52 Iowa 150. The defendant was charged with the murder of one Roberts. In February, 1878, the defendant and Roberts were engaged in farming, and resided upon adjoining farms in the county of Pottawattamie. On the sixth day of that month Roberts was found dead in the road, about thirty rods from the defendant's house. There was a hole in his head near one eye, and a pistol ball was found in his brain. He had left home a short time previous with the avowed intention of going on an errand to the house of one Axtel. The road from Roberts's house to Axtel's led by the defendant's. Circumstances, not necessary to be detailed here, indicated strongly that Roberts was killed by the defendant. His counsel contend that if he killed Roberts he did so in self-defence. They also contend that he was in such an unsound condition of mind that he was not responsible for his acts. Soon after Roberts died, and not far from where he died the defendant was seen with blood running down both sides of his face, indicating that he had received an injury. As to his mental condition the evidence shows beyond controversy that he was suffering under great depression, caused by trouble of the gravest character. His family was broken up. His wife, as the evidence tends strongly to show, had committed adultery with Roberts, and the fact had come to the defendant's knowledge. She had left him and had removed all the furniture from the house except a bedstead, and he had reason to apprehend that Roberts would the next day, or soon there-

after, dispossess him of the house. To the specific evidence of insanity we shall refer briefly hereafter.

1. The defendant assigns as error the admission of certain evidence. One McCuen was examined as a witness in behalf of the state. He testified that the evening before Roberts's death he saw him at Axtel's. For the purpose of showing that Roberts was on legitimate business at the time he was killed, the state sought to show that he had an errand at Axtel's that day. It accordingly asked McCuen a question in these words: "State if any arrangement was made, on the evening prior to the decease of Roberts, by which Roberts was to go to Axtel's the next day." This question was objected to by the defendant as leading, immaterial, and incompetent. The court overruled the objection and the witness answered: "He made an arrangement to be there the next morning, between eight and nine o'clock, to look at some steers Axtel had to sell."

The question, strictly considered, called for answer by *yes* or *no*, and possibly it might be considered as indicating that the interrogator desired that the answer should be in the affirmative. But the question was only very slightly leading, if at all, and it seems clear to us that the defendant was not prejudiced by the character of the question as leading. He further objects, however, that the question called for a conclusion. He insists that an *arrangement* is the result of what is said, and that if any evidence upon the subject was admissible the witness should have been asked for what was said and not the result. If the case were to turn upon whether there was or was not an *arrangement*,—that is, if that were the ultimate fact to be found by the jury,—there would be much force in the defendant's objection. But that was not an ultimate fact. Any evidence of talk indicating Roberts's purpose to go to Axtel's the next morning to buy steers, though amounting to less than arrangement, would have had substantially the same effect. It would have been a circumstance tending to show that Roberts's journey that morning towards the defendant's house was explainable upon a different theory from that of the defendant, which was that he was out seeking the defendant's life or injury. It is further objected that what was said was at least but hearsay, and inadmissible for that reason, if no other. The talk, it is true, was not concurrent with the journey in point of time. But to render declarations admissible as a part of the *res gestæ*, it is not necessary that they should be precisely

concurrent in point of time with the principal transaction. It is sufficient if they are near enough to clearly appear to be so spontaneous and unpremeditated, and free from sinister motives, as to afford a reliable explanation of the principal transaction. *People* v. *Vernon*, 35 Cal. 49; *Mitchell* v. *State*, 41 Ga. 533; *Handy* v. *Johnson*, 5 Md. 450. The case at bar, we think, comes within the rule. We see no error in allowing the question to be answered.

2. One Orlando Wright, a nephew of the defendant, was examined as a witness in behalf of the state. Having testified that five or six weeks prior to Roberts's death the defendant borrowed a revolver belonging to the witness' brother, he was asked by the defendant on cross-examination whether the defendant was not at that time living on friendly terms with Roberts. The state objected to the question as not in cross-examination, and the objection was sustained. In this we think there was no error. It was not the object of the question to allow the witness to modify or explain his testimony given in chief, nor was it to elicit testimony which should have the effect to discredit the testimony which the witness had given in chief. The object was to prove an independent fact, not explanatory of nor inconsistent with the testimony given, but to render the fact testified to consistent with the defendant's innocence; or, in other words, the object was to rebut the effect which the state intended to produce. It appears to us, therefore, that if the defendant desired to introduce such evidence it was more proper that he should be required to do so in rebuttual.

3. The court instructed the jury that "if the evidence shows that the defendant deliberately formed a design to take the life of Roberts, and sought a meeting with him for the purpose of executing that design, and in that meeting and in pursuance of that design inflicted upon Roberts the wound which caused his death, the crime, if he is responsible for the act, is murder in the second degree." The defendant assigns the giving of this instruction as error. It is contended by the defendant that there is no evidence that he sought a meeting with the design to take Roberts's life. We think that the evidence is very strong that the defendant took Roberts's life by shooting him with a revolver. That he sought a meeting with that intent the evidence is not so strong. But if he took Roberts's life with a revolver, then it would seem that he must have taken a revolver with him when he proceeded to the place of meeting. The case

is quite different from what it would have been if Roberts had been killed with a club, or some weapon which might be supposed to have been picked up by the wayside. We think that there was some evidence that the defendant sought a meeting with the design of killing Roberts.

4. The court gave an instruction in these words: "You have evidence of the conduct, language, and appearance of the accused during the time of the alleged killing, during which time it is alleged that he was insane. You are to consider all the facts which you find to be established by the evidence, and which relate to the conduct, language, and appearance of the defendant during that time; and you should consider them for the double purpose of testing the value of the opinions of such witnesses as have given opinions on the question of the defendant's insanity, based upon such facts, and of determining whether the fact of insanity is established independent of such opinions." The defendant assigns the giving of this instruction as error. The objection urged is that the jury was told in substance that if they found the defendant insane they must so find from facts independent of opinions. We hardly think that the instruction, even when taken by itself, is susceptible of such construction. But the jury was expressly told, in another instruction, that they were to determine what weight and credit should be given to the opinions of witnesses upon the question of insanity. The jury, we think, could not have been misled in the way which the defendant claims. While we say this, we ought, perhaps, to say that we do not regard the question as to whether insanity was fully established by facts independent of opinions necessary to be considered. It is true that the facts, as the court said, were to be considered for a double purpose. But, in defining the double purpose, we should have been better pleased if the court had said that they might be considered for the purpose of testing the value of the opinions, and upon the question as to how far they tended to establish the fact of insanity independent of the opinions. We make this criticism the more freely because we have reached the conclusion that for errors to be pointed out hereafter the case must be reversed and remanded for another trial.

5. The instruction above set out in our opinion contains error. The jury was directed to consider the facts relating to the conduct, language, and appearance of the defendant *during the time of the alleged killing*. Now, while it is true that it was not material

whether the defendant was insane at any other time, if he was sane at that time, yet his conduct, language, and appearance at other times were not to be excluded. There was no evidence whatever as to the conduct, language, and appearance of the defendant at the precise time when Roberts was killed. He was seen by others on that day, but the evidence of insanity pertains to other days. The evidence showed that he was insane in early life, and had not fully recovered when he came to western Iowa. There was evidence tending to show that from the time of his first insanity "any trouble," (to use the language of the witness), "would throw him off his balance." Four relatives of the defendant testified to his changed mental condition from the time when his trouble with Roberts commenced, and they gave their opinion that he was insane. Two others, who do not appear to be relatives, testified to strange conduct of the defendant, and gave their opinion that he was insane. In addition to that, one physician testified that he made an examination of him, and regarded him as insane. While the court did not say that the jury should not consider the conduct, language, and appearance of the defendant at times other than that of the alleged killing, the tendency of the instruction was to confine, by implication, the attention of the jury to that time. In this it appears to us that there was error.

6. The court gave an instruction in these words: "The burden is on the defendant to establish by a preponderance of evidence that at the time of the killing of Roberts, if he did kill him, he was in such a state of insanity as not to be accountable for the act; and if the evidence goes no further than to show that such a state of mind was possible or *merely probable*, it is not sufficient, but it must go further and overcome the presumption of sanity, and fairly satisfy you that he was not sane." The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained. If it was made *probable* to the jury that the defendant was so far insane as not to be accountable for his acts, we think that he should have been acquitted. Worcester defines *probable* as "having more evidence than the contrary." Webster defines it as "having more evidence for than against." We think that it was sufficient if the evidence of insanity preponderated. The idea of the court seems to have been that as the presumption of sanity counts for something it cannot be said to be overcome by a bare preponderance of evidence. There is a course of reasoning which might, perhaps,

seem to support this view. The difference between a bare preponderance of evidence and that which is next less might be said to be infinitely small, and that what is infinitely small cannot be weighed or appreciated. But such considerations are too refined. The rule as to the presumption of sanity has its practical application in imposing the burden of proof upon him who sets up insanity. This is all. The presumption is not to be weighed against any measurable amount of evidence.

The judgment, we think, must be reversed, and the case remanded for another trial.

SEEVERS, J., and ROTHROCK, J., dissented.

The question upon which party rests the burden of proving sanity or insanity in criminal cases, where insanity is relied upon as a defence, is one upon which there is considerable conflict of authority. Perhaps a majority of the cases will be found to hold that the rule that all the facts constituting the guilt of the defendant must be proved beyond a reasonable doubt, and that the defendant is entitled to the benefit of a reasonable doubt, does not apply to his sanity, which is presumed till the contrary is proved by a preponderance of evidence, the burden being on the defendant to prove his insanity by a preponderance of evidence, as in case of any other independent fact constituting a defence. See *State* v. *McCoy*, 34 Mo. 531; *State* v. *Klinger*, 43 Id. 127; s. c. 46 Id. 224; *State* v. *Hundley*, 46 Id. 414; *State* v. *Smith*, 53 Id. 267; *State* v. *Brown*, 12 Minn. 538; *State* v. *Starling*, 6 Jones's L. 366; *People* v. *Robinson*, 1 Park. Cr. 649; *U. S.* v. *McGlue*, 1 Curt. C. C. 7; *Lœffner* v. *State*, 10 Ohio St. 598; *Bond* v. *State*, 23 Id. 349; *People* v. *Myers*, 20 Cal. 518: *People* v. *Coffman*, 24 Id. 230; *People* v. *McDonell*, 47 Id. 134; *Kriel* v. *Commonwealth*, 5 Bush (Ky.) 362; *State* v. *Lawrence*, 57 Me. 574; *Boswell* v. *Commonwealth*, 20 Gratt. 860; *State* v. *Felter*, 32 Iowa 49; *Newcomb* v. *State*, 37 Miss. 383 *State* v. *Brinyea*, 5 Ala. 241; *Humphreys* v. *State*, 45 Geo. 190; *Lynch* v. *Commonwealth*, 77 Penn. St. 205; *Reg.* v. *Layton*, 4 Cox C. C. 149; *McKenzie* v. *State*, 26 Ark. 334; *State* v. *Coleman*, 27 La. Ann. 691.

As regards the point involved in the principal case, the opinion of the majority of the court seems much more reasonable than that of the dissenting judges. Indeed it is difficult to see how the court in view of the prevailing rule in that state, could have arrived at any other conclusion than that arrived at by the majority of the judges. If it is not allowable to resort to dictionaries for a definition of the word "probable," as was done by the majority of the court, there would be difficulty in ascertaining its meaning, unless the minority would settle the meaning of the word by judicial decision, or entirely disregard the word and assign no meaning to it.

But there is another class of cases which lays down what, in view of the presumption of the innocence of the accused, seems to be a much more reasonable rule than that either in the principal case, and prevailing, perhaps, in the majority of the states, that sanity being the normal condition of the mind, "they (the prosecution) are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to over-

throw that presumption, the jury are to examine, weigh and pass upon it with the understanding that, although the initiative in presenting the evidence is taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the condition of guilt:" *People* v. *Garbutt*, 17 Mich. 23; *People* v. *McCann*, 16 N. Y. 58; *Commonwealth* v. *Kimball*, 24 Pick. 373; *Commonwealth* v. *Dana*, 2 Metc. 340; *State* v. *Marler*, 2 Ala. 43; *Commonwealth* v. *McKie*, 1 Gray 61; *Commonwealth* v. *Rogers*, 7 Metc. 500; *Hoppes* v. *People*, 31 Ill. 385; *Chase* v. *People*, 40 Id. 352; *Doty* v. *State*, 7 Blackf. 427; *Walter* v. *People*, 32 N. Y. 147. See, also, *State* v. *Bartlett*, 43 N. H. 224; *Stevens* v. *State*, 31 Ind. 485; *Commonwealth* v. *Heath*, 11 Gray 303; *State* v. *Crawford*, 11 Kans. 42; *Anderson* v. *State*, 42 Geo. 9; *Smith* v. *Commonwealth*, 1 Duvall (Ky.) 224; *State* v. *Johnson*, 40 Conn. 136; 2 Bish. Cr. Prac., sects. 599, 673, 699, and cases cited.

M. D. EWELL.

Supreme Court of Kansas.

CITY OF TOPEKA v. GILLETT.

Where an act of the legislature attempting to confer corporate powers is so special in its provisions that it can apply only to three certain cities, and cannot possibly, at any time, apply to any other corporation, public or private, it is in contravention of sect. 1, art. 12, of the Constitution, which provides that "the legislature shall pass no special act conferring corporate powers," and is void.

For the purpose of construing a constitution or statute, courts may take judicial notice of everything which may affect the validity or meaning of such constitution or statute.

An act of the legislature may be special where it applies to many particular and existing persons or things, as well as where it applies to only one; and it may be special where it simply describes such particular persons or things so that they may be known, as well as where it gives their particular names or distinctive appellations.

Where a supposed addition to a city of the first class has never been subdivided into lots, blocks, streets and alleys, by the proprietors thereof with any intention that it should become a part of the city, and no map or plat of such supposed addition has ever been made, acknowledged or filed in the office of the register of deeds, by such proprietors, or with their consent or by their authority, and such proprietors have never consented that such supposed addition should be made or should become a part of the city: *Held*, that an ordinance of the city defining the boundaries of the city, and including such supposed addition within its boundaries, does not bring such supposed addition within the boundaries of the city.

And where the city claims that such supposed addition is within the city limits, but such claim has at all times been disputed and resisted by the proprietors thereof: *Held*, that such proprietors are not estopped from maintaining an action to enjoin the collection of a tax levied by the city upon the plaintiffs' property situated in such supposed addition.

ERROR from Shawnee County.

A. B. Quinton and *J. B. Johnson*, attorneys for plaintiffs.